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IN THE

Supreme Court of the United States

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October Term, 1940

No. 785

WENZEL & HENOCH CONSTRUCTION COMPANY,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your petitioner, Wenzel & Henoch Construction Company, a corporation, respectfully shows to the Court as follows:

Summary and Short Statement.

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit affirming a judgment against the petitioner entered by Yankwich, D. J., in the United States District Court for the Southern District of California, Central Division. The opinion for the Circuit Court of

Appeals was written by Denman, C. J., and was filed October 15, 1940.

The litigation arises in connection with certain agreements executed March 17, 1933, under which the petitioner was to construct the San Jacinto Tunnel as part of the Colorado River Aqueduct project. On January 8, 1937, the petitioner brought this action against The Metropolitan Water District to recover on three counts: (1) for $5,213,929.95 damages for breach of contract; (2) in *quantum meruit* for $1,346,720.75 for the reasonable value of work done; (3) for $150,000 money had and received. Answers were filed, and pursuant to stipulation, hearings on the issue of damages were postponed until after the determination of liability. Trial by jury was waived, and Judge Yankwich entered judgment against the petitioner on all counts [R. 427-29]. The Circuit Court of Appeals affirmed this judgment.

Statement of Facts.

The petitioner, Wenzel & Henoch Construction Company (hereinafter referred to as the "Company"), is a Wisconsin corporation engaged in the construction business. The respondent, The Metropolitan Water District of Southern California (hereinafter referred to as the "District"), is a municipal corporation of California. As part of the Colorado River Aqueduct project the District desired to have a thirteen mile tunnel constructed through San Jacinto mountain in Southern California. Before issuing specifications and a call for bids, the District caused a thorough geological survey of the projected tunnel route to be made. Exploratory drifts and extensive core drillings were made. With the information gained from this investigation, the District caused a

printed report to be issued as to the probable conditions of the work. This report, together with all the data upon which it was based, was made available to bidders, as were also the specifications, instructions, copies of the contracts, etc. [R. 74-265]. Paragraph B-6 of the instructions to bidders [R. 91] purported to relieve the District of any liability for the inaccuracy of this information; bidders were instructed to personally examine the location of the proposed work and to satisfy themselves as to the actual conditions and requirements and as to the accuracy of the estimated quantities of materials stated in the Bidding Sheet.

Section 7 of the specifications which were later made a part of the contract provided, *inter alia*, that if at any time the Chief Engineer of the District was of the opinion that the performance of the contract was unnecessarily or unreasonably delayed, he might, on behalf of the District, by written notice instruct the Company to discontinue so that the District could take over the work and complete it by a new contract or by force account [R. 120-121].

The Company was the low bidder and on March 17, 1933, the Public Works Contract was executed [R. 111-14]. On the same date a supplemental agreement was executed by the Company and the District for the purpose of establishing the responsibility of the Company [R. 261-65]. Under the latter agreement the Company agreed to establish and maintain in a California bank in cash or approved bonds a fund of $250,000 plus certain progress payments. Under this supplemental agreement the Company further agreed to deposit with the laborers' and materialmen's surety corporations $300,000 as collateral for the purpose of indemnifying the District.

Immediately thereafter the Company began moving in equipment and sinking shafts preliminary to the work on the tunnel proper. The tunnel excavation was started in the early part of 1934 and from the very beginning conditions were encountered radically different from those anticipated in the Bidding Sheet, specifications, and in the extensive geological report furnished by the District. These sources had for the most part furnished the foundation upon which the bids had been based. The character of the ground and the amount of water encountered was completely different from that which had or could reasonably have been anticipated. The Company's complaint is not merely that the construction was more difficult or more expensive than was expected. The Company contends that the condition of the ground and the flowage of water actually turned out to be so completely different from such conditions as they were understood to exist or could reasonably have been anticipated to exist by each of the contracting parties, that performance of the public works contract as it was originally understood by the parties was impracticable because of the extreme difficulty and excessive expense involved. For example, the District estimated, as included in its bidding sheet, that the ground condition was such that about 500,000 pounds of steel support would be required for the entire line of the tunnel, and the cost of such an amount of steel was estimated by the Company in preparing its bid [R. 100]. Actually, in completing the first 18% of the total excavation the Company had to install 2,500,000 pounds of such steel support [R. 461]. On "Sheet 7" attached to the public works contract there was a log of certain core drillings prepared by the District's geologist [R. 260]. On this sheet the bidders were referred for further infor-

mation to the data contained in the geologist's extensive printed report No. 474 [Pltf. Ex. 16; R. 765], a portion of which was set out in the Company's original complaint [R. 18-21]. "Sheet No. 8" attached to the public works contract was a drift log showing the character of the ground encountered and estimating the maximum flow of water at 310 gallons per minute [R. 261]. The information set forth on " Sheets 7 and 8" and in the geologist's printed report indicated that no great water flow would be encountered and that most of the tunnel would be in solid ground. In the examination of the site of the tunnel which the Company was able to make during the forty days between the invitation for bids and their due date nothing was found to indicate that the District's information did not portray a correct picture of the underlying ground conditions. Certainly the District believed such reported facts to be true and so did the Company, and there is no evidence that either party was negligent in so believing; the contracts were entered into with both parties believing these underlying conditions to exist. In making its bid the Company set out that it proposed to use pump de-watering equipment capable of handling 1000 gallons a minute, enough to cope with far in excess of the 310 gallon predicted maximum. In accepting the Company's bid without question and approving such equipment the District would seem to have indicated that it regarded such equipment as adequate. But very soon after excavation was started on the tunnel proper slushy ground and unprecedented flows of water developed. The flowage thus encountered was so great that at one time during July, 1934, water rushed into the tunnel at the rate of 10,000 gallons per minute, a flowage thirty-three times greater than the maximum expected by either the Com-

pany or the District [R. 451]. The pumping equipment was flooded out, the tunnel was filled with mud, water, and rock. The Company immediately attempted to secure sufficient pumping equipment to cope with this unprecedented flow but large enough pumps had to be made to order [R. 452]. New head frames had to be built within the excavation to handle the tremendous pumping equipment, and after waiting for head frames to be built and for the pumps to be manufactured, it took three months to empty the water and debris out of the tunnel [R. 453]. After the excavation was cleared and work was resumed the water flowage continued at the rate of 1000 gallons per minute, thrice the predicted maximum. Hardly was the situation under control when, in November, 1934, a second underground surge was encountered flooding out the new enlarged pumping machinery and again filling the tunnel with mud and water [R. 454]. After the damage from this second flood was finally repaired the average flow of water continued at 3000 gallons per minute [R. 455]. The great quantities of gravel and rock which came in with the water hindered the normal operation of the pumping equipment [R. 456]. What machinery had not been ruined by these two floods had to be completely reconditioned. There is no evidence that the Company should reasonably have anticipated these conditions or that they could have prevented them. The Company, realizing that the construction could not practicably be continued under such conditions sent a letter to the District in December, 1934, asking permission to deviate from the charted course and put the tunnel through what was expected to be better ground [R. 458]. The District stalled this request until it had forcibly taken possession of the work away from the Company as hereinafter re-

counted. It is interesting to note that when the District took over the work it soon realized that further performance according to the original plans was impracticable under existing conditions. The District itself soon deviated the excavation work from the course the Company had been forced to follow [R. 1079, 1082, 1086].

Under the ordinary conditions encountered at the very beginning, the tunnel excavation had been running ahead of schedule, but naturally, when the Company ran into the unforseen conditions above described there was delay. No one doubts that the nature of the conditions underlying the work was essentially different from that which both of the contracting parties had in mind when the agreements were executed. Nevertheless, on December 3, 1934, shortly after the second unprecedented flood described *supra,* the District's engineer notified the Company that the work was unnecessarily and unreasonably delayed and unless progress improved by January 15, 1935, the District would take over the work. On January 9, 1935, the District notified the Company that they understood that the construction fund established by the supplemental agreement had been excessively depleted and that the District was withholding the current progress payment pending receipt of a full explanation [R. 562-63]. On January 14, 1935, the Company furnished the desired explanations and protested the withholding of the progress payments [R. 566-70]. On January 15, 1935, the District instructed the Company to discontinue so that the District could take over all work as the District Engineer was of the opinion that the work had been unnecessarily and unreasonably delayed [R. 571-72]. The Company, feeling that the work had not been unnecessarily and unreasonably delayed, at first refused to give up and the District

in a suit which it instituted was denied a preliminary injunction which it sought to prevent the Company's continuation [R. 271-72]. On February 12, 1935, under cover of darkness with physical force and armed men, the District took over the job and all of the Company's equipment, and retained such possession and continued the work to its completion [R. 420].

On January 8, 1937, the Company instituted this action in the United States District Court for the Southern District of California. The requisite amount in controversy being present, federal jurisdiction is based on diversity of citizenship. The Company sought recovery on four separate causes of action: (1) for $5,713,929.95 damages for breach of contract; (2) in *quantum meruit* for $1,346,720.75, the unpaid reasonable value of work done; (3) for $150,000 money had and received; and (4) in *quantum meruit* for $161,306.53 for reasonable value of extra work done. Judge Yankwich overruled demurrers to the first three causes of action. He sustained a demurrer to the fourth cause of action and with leave to amend granted the defendant's motions to strike certain portions of the complaint, including the paragraph referring to and partially setting out the printed report of the District's geologist and alleging that the Company relied thereon in making its bid [R. 51-52]. A jury having been waived, the action was thereupon tried before Judge Yankwich. During the trial Judge Yankwich refused to admit in evidence the previously referred to report of the District's geologist [Pltf. Ex. 16; R. 765]. He also excluded all testimony tending to prove that both parties relied upon this report and other information supplied by the District in making the contract [R. 1284-90], and he refused to allow certain amendments to the Company's

complaint incorporating such matters [R. 1296-1300]. By stipulation, evidence on the issue of damages was postponed until liability had been finally determined [R. 425-26]. The trial court entered judgment against the Company on all counts. The Circuit Court of Appeals affirmed, holding (1) that the District Engineer's order to discontinue work was justifiable and that the District by withholding the December progress payment was not guilty of a breach sufficiently great to frustrate any further rights of the District under the contract; (2) that there could be no recovery in *quantum meruit* because it appears from the record that there was no rescission of the contract within a reasonable time of the breach; and (3) that there was no prejudicial error with regard to the trial court's rulings with regard to the pleadings and the evidence.

Questions Involved.

(1) If the conditions actually underlying the construction were so greatly different from the underlying conditions as they were understood to exist by both parties when they entered into the agreement as to render performance according to the terms of the original agreement impracticable due to excessive and unreasonable difficulty and expense, was the trial court justified in holding that as a matter of law the Company could not recover in *quantum meruit* for the reasonable value of the labor and materials furnished.

(2) If there was a possibility that the underlying conditions actually encountered might reasonably have been regarded as so greatly different, was it not prejudicial error for the trial court to strike that portion of the Company's complaint, to refuse to allow the Company's

proposed amendment, and to exclude all evidence and testimony referring to the District's geological report and showing that the parties entered into the contracts relying upon information contained therein, and believing that the conditions underlying the agreement were as described therein?

(3) Even though the original contract is not to be deemed abrogated in its entirety, in view of the relation between the unanticipated ground conditions and the time initially estimated for completion of the work, was not the District's seizure of the work because of alleged delay combined with its previous refusal to pay the December progress payment a breach of contract?

Reasons for Granting Writ of Certiorari.

The petitioner prays that the Court grant a writ of certiorari in this case:

(1) Because the District Court and the Circuit Court of Appeals in disposing of this case have failed to apply, or reach a result consistent with, the local law of the State of California;

(2) Because the adjudication of this action by the lower courts, if allowed to stand, would amount to a gross miscarriage of justice, inequitably removing the unfortunate but fortuitous construction burden from the State of California which derives all of the benefit from the completed work and is better able to stand the added cost, and thrusting it upon the innocent contractor who derives no benefit, is in no way responsible for its presence, and who is less able to support its weight; and

(3) Because the pronouncement by this Court upon the legal issues involved in this case will do much to pro-

mote the equitable clarification of an important doctrine of contract law.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that the judgment of said Circuit Court of Appeals in this case, affirming the judgment of the United States District Court for the Southern District of California, Central Division, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

ARTHUR E. MORETON,
Attorney for Petitioner.